84-1108 (1)

No.

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In the Supreme Court of the United States

October Term, 1984

JOHN R. WENTURINE,
Petitioner

v.

RICHARD A. PARFETT, SEVEN SPRINGS MOUNTAIN RESORT, INC., BOROUGH OF SEVEN SPRINGS,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT [CA-3 No. 83-5742]

THOMAS A. CRAWFORD, JR.
PA I.D. No. 30215
Attorney for Petitioner

Suite 500, Triangle Bldg.
701 Smithfield Street
Pittsburgh, PA 15222
(412) 355-0888

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 888-2244

QUESTIONS PRESENTED

I. Is a municipal corporation immune from suit for civil rights violations?

II. Is a corporation immune from suit for civil rights violations?

III. Must pendent jurisdiction be declined where a party's inclusion in the case rests solely upon such jurisdiction?

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UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 83-5742

JOHN R. WENTURINE,

Appellant

v.

RICHARD A. PARFETT, and SEVEN SPRINGS MOUNTAIN RESORT, INC., BOROUGH OF SEVEN SPRINGS

(Civil No. 80-1866—W.D. Pa.—Pittsburgh)

District Judge: Honorable Gustave Diamond

Submitted Under Third Circuit Rule 12(6)

June 12, 1984

Before: Seitz, *Chief Judge,* Adams, *Circuit Judge,* and Latchum, *Circuit Judge.**

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* Honorable James L. Latchum, United States District Court for the District of Delaware, sitting by designation.

Opinions and Orders Below

JUDGMENT ORDER

After consideration of the contention raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

(s) Seitz
Chief Judge

ATTEST:

(s) Sally Mrvos
Sally Mrvos, Clerk

DATED: JUN 13 1984

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 83-5742

JOHN R. WENTURINE,

Appellant

v.

RICHARD A. PARFETT, and SEVEN SPRINGS MOUNTAIN RESORT, INC., BOROUGH OF SEVEN SPRINGS

(Civil No. 80-1866—W.D. Pa.—Pittsburgh)

BEST AVA

Opinions and Orders Below

SUR PETITION FOR REHEARING

Present: Aldisert, *Chief Judge,* Seitz, Adams, Gibbons, Hunter, Weis, Garth, Higginbotham, Sloviter, Becker, *Circuit Judges,* and Latchum, *District Judge.**

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

(s) Seitz

Circuit Judge

DATED: AUG 23 1984

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* The Honorable James L. Latchum, United States District Judge for the District of Delaware, sitting by designation.

ABLE COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 80-1866

JOHN R. WENTURINE,

Plaintiff

vs.

RICHARD A. PARFETT, SEVEN SPRINGS MOUNTAIN RESORT, INC., and THE BOROUGH OF SEVEN SPRINGS,

Defendants

TRANSCRIPT OF PROCEEDINGS

* * * * * * * * *

THE COURT: If you find that they caused him by some conspiratorial—

MR. CRAWFORD: No, no. I'm not saying—

THE COURT: That would be one thing. But to say that they took him down to have him sworn in as a constable or some such thing as that and thereafter they are responsible for his conduct, I think that's rather—

MR. CRAWFORD: I think what they have done is, they have clothed their security guards with the State or the Commonwealth authority by obtaining the municipal charter and employing them as a dual position.

THE COURT: Well, that could be.

MR. CRAWFORD: It's hard to say. It is not something I found a lot of law on.

THE COURT: No. We have done our own research and we have read the law cited to us by counsel, and I think we have done the best we can with it. They are dismissed at this point, and maybe the Circuit can enlighten us if that—unless you could come up with some reason why we should reconsider with regard to the corporation, but I think that—

MR. CRAWFORD: I came up with what I had.

THE COURT: I think we have all the law that we need for the time being.

All right. We can go off the record for a moment.

(Discussion off the record.)

(Proceedings adjourned at 3:05 p.m.)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 80-1866

JOHN R. WENTURINE,

Plaintiff

v.

RICHARD A. PARFETT, et al.,

Defendants

Order Below

ORDER OF COURT

AND NOW, this 25th day of November, 1981, after consideration of the defendants' motions to dismiss, IT IS ORDERED that the motion of defendant Seven Springs Resort, Inc. be, and the same hereby is, granted and the motion of the defendant Richard A. Parfett be, and the same hereby is, denied for the reasons stated and transcribed on the record of this court's bench opinion rendered on November 24, 1981.

(s) Gustave Diamond
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 80-1866

JOHN R. WENTURINE,

Plaintiff

v.

RICHARD A. PARFETT, and SEVEN SPRINGS MOUNTAIN RESORT, INC., BOROUGH OF SEVEN SPRINGS,

Defendants

Order Below

ORDER OF COURT

AND NOW, this 12th day of October, 1983, the court having granted a motion to dismiss the defendant Borough of Seven Springs on the 4th day of June, 1981, and having granted a motion to dismiss the defendant Seven Springs Mountain Resort, Inc., on the 25th day of November, 1981, and now concluding that there is no just reason for delay, IT IS ORDERED that final judgment be, and the same hereby is, entered in favor of each of the above-named defendants and against the plaintiff, John R. Wenturine.

(s) Gustave Diamond
United States District Judge

STATEMENT OF JURISDICTION

On 4 June 1981 and 25 November 1981, the district court ruled that Seven Springs Mountain Resort, Inc., and the Borough of Seven Springs were not "persons" for the purpose of a civil suit seeking damages filed pursuant to Title 42, United States Code, Section 1983. The defendant Richard A. Parfett was not dismissed. See Exhibit A, appendix pp. 1-3.

On 3 December 1981 the Petitioner filed a notice of appeal which was docketed by The Third Circuit Court of Appeals at No. 81-3122. See Exhibit B, appendix pp. 4-5.

On 30 September 1982 The Third Circuit Court of Appeals dismissed Petitioner's previous appeal because the district court did not make an express direction for the entry of judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, without prejudice to Petitioner's right to apply to the district court for a determination and direction under Rule 54(b). See Exhibit C, appendix pp. 6-8.

On 22 August 1983, after conferences with the district court and counsel for the Respondents, it was requested that the district court enter final judgment pursuant to Rule 54(b) against the plaintiff and in favor of defendants Seven Springs Mountain Resort, Inc., and Borough of Seven Springs to facilitate having this appeal heard before trial.

Statement of Jurisdiction

On 12 October 1983 the district court entered final judgment pursuant to Rule 54(b) in favor of Seven Springs Mountain Resort, Inc., and the Borough of Seven Springs in accordance with the directions of The Third Circuit Court of Appeals to permit the hearing of this appeal. See Exhibit D, appendix pp. 9-10.

On 17 October, 1983, the Petitioner filed notice of appeal from the final order of the district court entered 12 October 1983. See Exhibit E, appendix pp. 11-12.

The Third Circuit Court of Appeals directed the Petitioner in this very same matter to apply for a final judgment pursuant to Rule 54(b), Federal Rules of Civil Procedure against the Petitioner and in favor of the two (2) dismissed Respondents. See Exhibit C, appendix pp. 6-8.

Rule 54(b) states:

> When more than one claim for relief is presented an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only an express determination that there is no reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicated fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or the form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Statement of Jurisdiction

The Petitioner followed The Third Circuit Court of Appeals' directions and the final judgment against him and in favor of Seven Springs Mountain Resort, Inc., and the Borough of Seven Springs pursuant to Rule 54(b) was applied for and granted.

In the cases where final judgment pursuant to Rule 54(b), The Third Circuit Court of Appeals had jurisdiction to hear an appeal of that judgment even though another defendant remains pending trial. See *Bowling v. Matthews,* 511 F.2d 112 (5th Cir. 1975); *Davis v. National Mortgage Corp.,* 320 F.2d 90 (2nd Cir. 1963); *Schnur & Cohan, Inc. v. McDonald,* 328 F.2d 103 (4th Cir. 1964); *District 65 Office Workers v. McKaguue,* 216 F.2d 153 (3rd Cir. 1954). Because final judgment has been rendered in favor of the Respondents in this case with the express determination that there was no just reason for delay, The Third Circuit Court of Appeals had jurisdiction to hear this appeal.

On 13 June 1984 the Third Circuit Court of Appeals affirmed the decision of the district court, and on 23 August 1984 denied the Petitioner's petition for rehearing.

Petitioner files this petition for a writ of certiorari pursuant to Title 28, United States Code, §§1254 and 2101, and Rule 20 of the Rules of the United States Supreme Court.

STANDARD OF REVIEW

Because this case involves only issues of jurisdictional allegations, questions of law, the district court decision is entitled to no deference. *Louise B. v. Coluatti,* 606 F.2d 392 (3rd Cir. 1979); *Jaconski v. Avisun Corp.,* 359 F.2d 931 (3rd Cir. 1966).

STATUTE INVOLVED

Title 42, United States Code, §1983:

> Every person who under the color of statute, ordinance, regulation, custom, or usage, of any State, Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Statement of Facts

On 31 December 1978 the plaintiff visited the Seven Springs Mountain Resort, Inc., a corporate resort complex which owns land in Somerset County, Pennsylvania. The Borough of Seven Springs is wholly owned by the resort company. There are no residents or other occupants other than employees and guests of the resort company. During the early morning hours of 1 January 1979, after attending several New Year parties, the plaintiff found himself in the main resort building. For no clear reason he was grabbed and savagely beaten by defendant Richard A. Parfett, a Seven Springs Mountain Resort, Inc., security guard who was also a Seven Springs Borough police officer (the two titles describe but one job). Defendant Parfett broke plaintiff's back by throwing him against filing cabinets and desks as well as striking and kicking him. As a result the plaintiff has suffered partial disability, pain, body-casts, and will remain partially disabled for the remainder of his life.

Defendant Parfett beat the plaintiff at the Police Headquarters at Seven Springs Borough located in the main resort building of Seven Springs Mountain Resort, Inc.

Plaintiff filed suit on 30 December 1980 invoking the jurisdiction of the United States Court for the Western

District of Pennsylvania, under the Fourteenth Amendment of the United States Constitution, Title 28, United States Code, Sec. 1331 and 1343; and Title 42, United States Code, Sec. 1983. See Exhibit F, appendix pp. 13-23.

On 4 June 1981 and 25 November 1981, the district court ruled that Seven Springs Mountain Resort, Inc., and the Borough of Seven Springs were not "persons" for the purpose of a civil suit seeking damages filed pursuant to Title 42, United States Code, Section 1983. The defendant Richard A. Parfett was not dismissed. See Exhibit A, appendix pp. 1-3.

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ARGUMENT

The District Court Erroneously Dismissed the Case Against the Corporate and Municipal Defendants

In the case at bar, the corporate and municipal defendants contend that the sole basis for recovery claimed by plaintiff is under a theory of *respondeat superior* trying to hold a municipality responsible for the civil rights violations of its employee, Parfett. Plaintiff denies that the *sole* basis alleged for recovery against the corporation and the municipality is the theory of *respondeat superior* under the civil rights act, Title 42, United States Code, Section 1983.

Plaintiff has also submitted other bases for jurisdiction: *First,* plaintiff has alleged a claim based upon pendent jurisdiction over the Commonwealth cause of action for the negligent actions of the corporation and municipality for permitting the beating of the plaintiff by defendant Parfett, for the failure to render assistance to plaintiff, who was so severely beaten, and permitting its own process to be abused by falsely charging the plaintiff with crimes. *Second,* plaintiff has alleged a claim directly under the authority of the Fourteenth Amendment to the Constitution of the United States of America for the substantial deprivation of his constitutional rights without due process of law.

Argument

Unlike the factual situations frequently cited by defendants, this was a case where high borough and corporate officials, acting in their official capacity on behalf of the borough and corporation, were present and, as a matter of borough and corporate policy, participated negligently and approved of the activities of defendant Parfett and the failure to render assistance and the abuse of process as alleged in paragraphs ten (10) and twelve (12) of the complaint. See Exhibit F, appendix pp. 17-18.

Perhaps in recognition of their responsibility for the acts of defendant Parfett, Harold Martin, sales coordinator for Seven Springs Mountain Resort, Inc., accepted service for the municipality and for defendant Parfett, stating that he was authorized to accept service for all Seven Springs employees. This again illustrated the fact that the Borough of Seven Springs is, in reality, *a sham municipality* and is totally the creature of Seven Springs Mountain Resort, Inc., with no real governmental function other than permitting corporate officials and employees to act under the color of law, statute, ordinance and custom as borough officials and employees.

It is significant that the District Court did not exercise its discretion to decline pendent jurisdiction over these defendants but merely held, citing *Kerry Coal Company v. United Mine Workers,* 637 F.2d 957 (3rd Cir. 1981), that the Court had no jurisdiction at all.

Civil Rights Act Application to Corporate Entities

It is well established that where a corporation, public or private, through its agents and employees violates any

citizen's civil rights under *color of official right* it can be held liable for civil rights violations through the Civil Rights Act of 1871. See *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 6 L.Ed. 2d 45, 81 S.Ct. 856 (1961); *Alston v. Allegheny Ludlum Steel Corp.*, 465 Supp. 171 (W.D. Pa. 1978), *aff'd*, 594 F.2d 854 (1979), *cert. denied*, 442 U.S. 493 (1979); *Croy v. Skinner*, 410 F. Supp. 117 (N.D. Ga. 1976); *Comtronics, Inc. v. Puerto Rico Telephone Co.*, 409 F. Supp. 800 (D.C. P.R. 1975), *aff'd*, 553 F.2d 701 (1st Cir. 1977); and *Johnson v. Riverside Hotel, Inc.*, 399 F. Supp. 1138 (S.D. Fla. 1975).

A "person" does not have to be an officer of a state or subdivision thereof to act "under the color of" state law, and a "person" may be a corporation for Section 1983 jurisdiction. See *Dennis v. Sparks*, 449 U.S. 24, 66 L.Ed. 2d 185, 101 S.Ct. 183 (1980); *Burton v. Wilmington Parking Authority*, supra. In the case at bar the corporation, by hiring, cooperating with, providing assistance to, and providing a location for defendant Parfett to act was every bit as much a participant with the state agent (Parfett) as was the Kress Co. in *Adickes v. Kress and Co.*, 398 U.S. 144, 26 L.Ed. 2d 142, 90 S.Ct. 1598 (1970); or the Deval County Ranch Co., Inc. in *Dennis v. Sparks*, supra.

With these points in mind, a review of the complaint is in order (see Exhibit F, appendix pp. 13-23):

(a) In paragraphs 5 and 6 of the complaint, defendant Parfett is alleged to be the joint employee of defendants Seven Springs Borough and Seven Springs Mountain Resort, Inc.

(b) In paragraph 7 of the complaint Parfett is alleged to have taken his illegal actions in behalf of both co-defendants.

(c) In paragraph 8, the Borough of Seven Springs is identified as the municipal corporate employer of Parfett.

(d) In paragraph 10, the corporate defendant is identified as the owner of the resort which comprises the totality of Seven Springs Borough, and again alleges that Parfett was acting on behalf of both of the other defendants.

(e) In paragraph 12 of the complaint, it is alleged that other employees of the municipal and corporate defendant stood by while Parfett beat the plaintiff and rendered no assistance.

(f) Paragraph 13 alleges that constitutional rights to freedom from seizure, arrest and detention, physical abuse, and the enjoyment of the facilities of the resort in interstate commerce were denied to plaintiff.

Thus, acting on behalf of both employers as a police officer and security guard (one and the same as the municipality is wholly owned by the corporation) Parfett administered an uncalled for beating upon the plaintiff in the borough owned by the corporation. Parfett acted under the color of state law, that is: Title 53, Purdon's Pennsylvania Statute, §46121, providing Commonwealth authority for the powers of borough police officers and as a security guard for the corporation. He was protecting corporate property only. His activities were controlled

by corporate officials. Clearly while acting under color of state law, both the corporation and the municipality serve only the same master—the corporate shareholders as was the case in *Marsh v. Alabama,* 326 U.S. 507, 90 L.Ed. 265, 66 S.Ct. 276 (1946). Unlike *Hudgens v. N.L.R.B.,* 424 U.S. 507, 47 L.Ed. 2d 196, 96 S.Ct. 1029 (1976), the Borough of Seven Springs is wholly the creature of Seven Springs Mountain Resort, Inc. Plaintiff has the burden of proving that the defendant Parfett was acting on behalf of both co-defendants under color of state law, but for the purpose of a motion to dismiss, the allegation is in the complaint clearly and unequivocally. Clearly the plaintiff had the right to enjoy the facilities of the resort, which was involved in interstate commerce, without a police official/security guard submitting him to a beating in the corporate security headquarters which doubles as a police department at the main resort building.

In *Marsh v. Alabama,* 326 U.S. 501, 90 L.Ed. 265 (1946), it was held that in a company-owned town, "corporate" action and "municipal" action were both "state" action for the purpose of Section 1983. Of course, direct constitutional guarantees protect citizens only from actions taken by governmental authorization. In the case at bar, this situation is even more pronounced than in *Marsh.* The municipality is merely a sham with no voters, no normal municipal functions, no property, no residents, only a resort which owns all of its land. Its municipal employees are paid with corporate funds generated by the resort, including the police, who have no citizens to protect, no businesses other than the corporation to protect, and whose jurisdiction exists only on corporate property.

Unlike a shopping center in *Hudgens,* the Borough of Seven Springs *is* a municipality and its police who are also corporate employees do in fact act under color of Pennsylvania law. This is not a freedom of speech or assembly case. This case involves a brutal arrest and assault by Parfett acting as a security guard for Seven Springs Mountain Resort, Inc. and as a police officer for the Borough of Seven Springs and Commonwealth of Pennsylvania. *Either role* would be sufficient to bring him and his corporate superior under the jurisdiction of Title 42, United States Code, Section 1983. See *DeCarlo v. Joseph Horne Co.,* 251 F. Supp. 935 (W.D. Pa. 1966); *Duriso v. K Mart Division of S. S. Kresge Co.,* 559 F.2d 1274 (5th Cir. 1977). See also *Reed v. Philadelphia Housing Authority,* 372 F. Supp. 686 (E.D. Pa. 1974); and *Augenti v. Cappellini,* 84 F.R.D. 73 (M.D. Pa. 1979).

Stated another way, particularly in "Company Town" cases, the corporate owner dominates the municipality to such a degree, or is so interrelated with the municipality, that the corporate owner's acts become "State" acts for the purpose of acting under the color of state action. See *Illinois Migrant Council v. Campbell Soup Company, Inc.,* 519 F.2d 391 (7th Cir. 1975), and on remand, 438 F. Supp. 222 (N.D. Ill. 1977). The special status of such "Company Towns" in the abridgement of civil rights and constitutional guarantees was recognized in *Marsh v. Alabama,* 326 U.S. 501, 90 L.Ed. 265 (1946), by virtue of the corporate action became state action and, thus, cognizable under the Constitution which limits State but not individual action. See also *Hudgens v. N.L.R.B.,* 424 U.S. 507, 47 L.Ed. 2d 196 (1976). However, in this

case the action of arrest, detention, prosecution, and beating by a security guard/police officer was so clearly "State action" taken on behalf of the "Company Town" as to be clearly an action contemplated by Title 42, United States Code, Section 1983. See *Illinois Migrant Council v. Campbell Soup Company, Inc.*, supra; *Duriso v. K Mart, Division of S. S. Kresge Co.*, supra; *DeCarlo v. Joseph Horne and Co.*, supra; *Augenti v. Cappellini*, 84 F.R.D. 73 (M.D. Pa. 1979).

In many jurisdictions, including the Western District of Pennsylvania, the doctrines of *respondeat superior* indirect and direct corporate liability have been held to be sufficient to hold the actor's (agent's) principal corporate, municipal, or individual principal, vicariously responsible for the acts of the agent. See *Holiday v. Connors*, 491 F.2d 539 (5th Cir. 1974); *Parker v. McKeithen*, 488 F.2d 553 (5th Cir.), *cert. denied*, 419 U.S. 838 (1974); *Turley v. Heyd*, 482 F.2d 590 (5th Cir. 1973); *Carter v. Estelle*, 519 F.2d 1136 (5th Cir. 1975); *Carter v. Carlson*, 477 F.2d 258 (D.C. Cir. 1971); *Skehan v. Board of Trustees*, 501 F.2d 31 (3rd Cir. 1974); *Scott v. Vandiver*, 476 F.2d 238 (4th Cir. 1973); *Sheridan v. Williams*, 333 F.2d 58 (9th Cir. 1964); *Roberts v. Williams*, 456 F.2d 819 (5th Cir. 1971); *Thomas v. Johnson*, 295 F. Supp. 1025 (D.D.C. 1968); *Williams v. Brown*, 398 F. Supp. 155 (N.D. Ill. 1975); *Lucas v. Kale*, 364 F. Supp. 1345 (N.D. W. Va. 1973); *Croy v. Skinner*, 410 F. Supp. 117 (N.D. Ga. 1976); *Hill v. Toll*, 320 F. Supp. 185 (E.D. Pa. 1970); *Alston v. Allegheny Ludlum Steel Corp.*, 465 F. Supp. 171 (W.D. Pa. 1978); *DeCarlo v. Joseph Horne Co.*, 250 F. Supp. 935 (W.D. Pa. 1966).

Thus, clearly, a cause of action was set out against both the individual defendant (Parfett) and the corporate defendant (Seven Springs Mountain Resort, Inc.), which employed him and owned the town which also employed him at the time of plaintiff's injury.

Jurisdiction Over the Municipal Corporation

Initially, *Monroe v. Pape,* 365 U.S. 167, 5 L.Ed. 2d 492, 81 S.Ct. 473 (1961), relied upon by the trial court and Respondent for the proposition that a municipality is not a "person" within the civil rights act of 1871 has been overruled by *Monell v. City of New York,* 436 U.S. 658, 56 L.Ed. 2d 611, 98 S.Ct. 2018 (1978). Specifically *Monell* holds:

> Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom Section 1983 applies. Local governing bodies, therefore, can be sued directly under Section 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the Section 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments,

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like every other Section 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision-making channels. As Mr. Justice Harlan, writing for the Court, said in Adickes v. S. H. Kress & Co., 398 U.S. 144, 167-168, 90 S.Ct. 1598, 1613, 26 L.Ed. 2d 142 (1970): "Congress included customs and usages [in Section 1983] because of the persistent and widespread discriminatory practices of state officials. . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law." On the other hand, the language of Section 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under Section 1983 on a *respondeat superior* theory.

We begin with the language of Section 1983 as originally passed: "[*A*]*ny person* who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, *shall subject,* or cause to be *subjected,* any person . . . to the deprivation of any rights, privileges, or immunities secured by the Con-

> stitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in action at law, suit in equity, or other proper proceeding for redress. . . ." 17 Stat. 13. (emphasis added). The italicized language plainly imposes liability on a government that, under color of some official policy, "causes" an employee to violate another's constitutional rights. At the same time, that language cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer employee relationship with a tortfeasor. Indeed, the fact that Congress did specifically provide that A's tort became B's liability if B "caused" A to subject another to a tort suggests that Congress did not intend Section 1983 liability to attach where such causation was absent [436 U.S. 690-692].

In this case, as pointed out previously and in the complaint, the defendant Parfett did not administer a beating to the Petitioner in a vacuum. In fact others including the Chief of Police were present. Clearly the defendant Parfett was merely carrying out the policy, custom, and practice of the municipal and corporate defendants with their approval. Thus, just as clearly, both the municipal and corporate "persons" within the act were, under color of state law, imposing the complained of violations of the Petitioner's civil rights upon him. The jurisdictional requirement is satisfied if the supervisor (chief) representing the company or municipality "fails to act, with a deliberate or reckless disregard of plaintiff's constitutional

rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent." *Lojuk v. Quandt,* 706 F.2d 1456, 1468 (7th Cir. 1982); *Crowder v. Lash,* 687 F.2d 996 (7th Cir. 1982).

Since *Monell,* the cases decided by the Court of Appeals have made it clear that a municipal corporation or other corporation may be held liable if the violation of the victim's rights occurs as a matter of official policy, or at the behest or within the knowledge of that official [in this case the Chief of Police/Chief of Security for the defendant] who is authorized to make final decisions for the defendants. See *Familias Unidas v. Briscoe,* 619 F.2d 391, 404 (5th Cir. 1980); *Schneider v. City of Atlanta,* 628 F.2d 915, 920 (5th Cir. 1980); *McKinley v. City of Eloy,* 705 F.2d 1110, 1116 (9th Cir. 1983). However, most similar to this case is *Black v. Stephens,* 662 F.2d 181, 191 (3rd Cir. 1981), *cert. denied,* 455 U.S. 1008 (1982), decided by The Third Circuit Court of Appeals holding the City of Allentown and the police chief liable for damages resulting from unreasonable force under the same statute (Title 42, United States Code, Section 1983) as charged in the case at bar stating:

> The City of Allentown also appeals the trial court's denial of its motion for judgment n.o.v. The City argues that Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 693, 98 S.Ct. 2018, 2037, 56 L.Ed. 2d 611 (1978), prevents a municipality from being held liable for the actions of its agents under a theory of *respondeat superior.* While we agree with this position, Allen-

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town was not found liable under such a theory. Rather, the city was held liable because of a governmental policy that proximately caused detective Stephens to file unwarranted charges against Elwood Black.

In Monell, the court held that municipalities may be sued directly under section 1983 for constitutional deprivations inflicted upon private individuals pursuant to a governmental custom, policy, ordinance, regulation, or decision. *Id.* at 690-91, 98 S.Ct. at 2035-36; Landrigan v. City of Warwick, 628 F.2d 736, 746 (1st Cir. 1980). The Court went on to emphasize, however, that a city's liability can be triggered by persons other than the municipality's official lawmakers: "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983." Monell, 435 U.S. at 694, 98 S.Ct. at 2037. (emphasis supplied).

In this case Chief Gable "may fairly be said to represent official policy" for the city of Allentown. *Id.* He wrote and implemented an official police regulation concerning disciplinary hearings which the jury found proximately caused Stephens to file unwarranted charges against Elwood Black. Chief Gable is the final authority in charge of the police force in Allentown. He is a member of the Mayor's cabinet, proposes and manages the budget and establishes policies and procedures for the entire police depart-

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ment. (Trial Trans. Vol. 4 at 118-19). Acting in this capacity, Chief Gable's promulgation of the regulation was an official act of policy which the jury found proximately caused Stephens to file unwarranted charges. Cf. Schneider v. City of Atlanta, 628 F.2d 915, 920, (5th Cir. 1980) (Prison director can engage the city's liability if he is the final authority or ultimate repository of city power). Landrigan, 628 F.2d at 747 n.8 (municipality is absolved from liability under section 1983 because of plaintiff's failure to allege an official whose actions might be considered those of the town). This is sufficient basis for the municipality's liability under Monell and section 1983.

In the case at bar it was alleged in the complaint at paragraph 12 (appendix p. 18) that:

> The acts alleged in paragraph 10 herein were committed before and in front of other employees of defendant Seven Springs Mountain Resort, Inc., and defendant Borough of Seven Springs, who were defendant Richard A. Parfett's superiors who neither made any effort to stop the beating of plaintiff nor to assist or aid plaintiff.

Thus, clearly as in *Black v. Stephens,* the municipality (and the corporation) may be held liable for the damages done to the plaintiff, punative damages, and attorneys' fees and costs as sought under a theory of direct responsibility. It should be noted that neither the chief nor any other employee of defendants withdrew the false charges against plaintiff; they merely failed to show up at the preliminary hearing.

The District Court might also have asserted *pendent jurisidiction* over the municipal and corporate defendant under the laws of the Commonwealth of Pennsylvania. New parties may be added to the case over which the Court can exercise pendent jurisdiction. See *Leather's Best, Inc. v. S. S. Mormaclynx,* 451 F.2d 800 (2d Cir. 1971); *Almeneres v. Wyman,* 453 F.2d 1075 (2nd Cir. 1971), *cert. denied,* 405 U.S. 944, 30 L.Ed. 2d 815, 92 S. Ct. 962 (1972); *Hatridge v. Aetna Casualty and Surety Co.,* 415 F.2d 809 (8th Cir. 1969). This body of law was recognized and allowed to stand in *Moore v. County of Alameda,* 411 U.S. 693, 30 L.Ed. 2d 596, 93 S. Ct. 1785 (1973), which upheld the District Court's discretion in accepting or rejecting jurisdiction over pendent state claims in factual situations similar to the case at bar. The Third Circuit Court of Appeals has adopted that position as well. See *Nelson v. Keffer,* 451 F.2d 289, 291 (3rd Cir. 1971); *Jacobson v. Atlantic City Hospital,* 392 F.2d 149, 153-154 (3rd Cir. 1968). Recall that the Court below specifically *did not* decide to exercise its discretion to preclude the exercise of its pendent jurisdiction, rather it held that it could not exercise jurisdiction in this case citing *Kerry Coal Company v. United States Mine Workers,* supra, at 965. At the time of the assault Pennsylvania decisions would have held both a municipality and corporation responsible on the theory of *respondeat superior or* on the theory of direct responsibilty. See *Chuy v. Philadelphia Eagles Football Club,* 595 F.2d 1265 (3rd Cir. 1979); *Smalich v. Westfall,* 440 Pa. 409, 269 A.2d 476 (1970); *Hardy v. City of Philadelphia,* 66 Pa. D. & C. 2d 71 (1974); *Barnhart v. Henson,* 7 Pa. D. & C. 3rd 678 (1978); *Heath v. Huth Engineers, Inc.,* 279 Pa. Superior

Ct. 90, 420 A.2d 758 (1980); *Lineaweaver v. Wanamaker*, 299 Pa. 45, 149 A. 91 (1930); *Dalgleish v. Oppenheimer, Collins and Co.*, 302 Pa. 88, 152 A. 759 (1930). The theory of direct responsibility is in addition to and not inconsistent with that of *respondeat superior*. See *Lucas v. Kale*, supra. Also clearly liability attaches for intentional as well as negligent torts. See *Fitzgerald v. McCutcheon*, 270 Pa. Superior Ct. 102, 410 A.2d 1270 (1979).

REASONS FOR GRANTING RELIEF

For the above stated reasons, the plaintiff-Petitioner respectfully submits that the dismissal of the Borough of Seven Springs and of Seven Springs Mountain Resort, Inc., for lack of jurisdiction was in error and respectfully requests that such decision be reversed and the case remanded to the United States Court for the Western District of Pennsylvania for trial against all three (3) original defendants. The United States Court for the Western District of Pennsylvania and the United States Court of Appeals for the Third Circuit have decided the important federal jurisdictional questions discussed herein —particularly the decision that private corporations are immune from jurisdiction, direct or pendent, of the Civil Rights Act of 1871—in a manner inconsistent with prior decisions of the Courts of Appeals, This Honorable Court, the Constitution of the United States, and the statutes cited herein. Clearly private, if not municipal corporations, are subject to the Act as individuals, and have never before been held immune or unincluded from its coverage since the nineteenth century. Therefore, the writ of certiorari should be granted.

Respectfully submitted,

THOMAS A. CRAWFORD, JR.
Attorney for Petitioner

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No._____

IN THE

Supreme Court of the United States

October Term, 1984

JOHN R. WENTURINE,

Petitioner,

vs.

SEVEN SPRINGS MOUNTAIN RESORT, INC., and the BOROUGH OF SEVEN SPRINGS,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[CA-3 No. 83-5742]

GERARD J. CIPRIANI
MAZZOTTA & WINTERS, P.C.
Attorneys for Respondents
2620 One Mellon Bank Center
Pittsburgh, Pennsylvania 15219
(412) 471-0300

Batavia Times Publishing Co.
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Statement of Case

The Petitioner has filed a brief in support of his petition for certiorari which more closely resembles a brief on the merits. Petitioner no where indicates that the decision rendered by the Federal Court of Appeals is in conflict with a decision of another Federal Court of Appeals on the same issue. Moreover, Petitioner fails to

aver that prior decisions in the instant matter were resolved in conflict with the Court of last resort of the Commonwealth of Pennsylvania. Additionally, there is no claim offered by the Petitioner that the Federal Court of Appeals for the Third Circuit has departed from the accepted and usual course of judicial proceedings.

Respondent believes that the misstatements in Petitioner's rendition of the facts require commentary. The Petitioner filed with the District Court a civil rights action against Richard A. Parfett, a police officer with the Borough of Seven Springs who apparently also acted as a security guard for the Seven Springs Mountain Resort, Inc. The Petitioner also brought an action against the Borough Seven Springs, a municipality, and the Seven Springs Mountain Resort, Inc., a private corporation. Upon receipt of the Complaint, the municipality and the private corporation, respondents herein, filed a Motion to Dismiss. The Trial Court sustained the motion with respect to the Borough on June 4, 1981 and with respect to the Resort on November 25, 1981 entering a final Order on October 12, 1983.

Factually, Petitioner was a patron at the resort on December 31, 1978 when he was confronted by Officer Parfett. While facilitating the arrest of the Petitioner for disorderly conduct, Parfett allegedly pushed the Petitioner causing injury to him. Petitioner clearly and distinctly states in his Complaint that solely as a result of the actions of Parfett, acting on behalf of both the Borough and the Resort, the Petitioner suffered damages.

Petitioner further alleged that the officer was acting under color of statute and ordinances pursuant to the Borough and the Commonwealth of Pennsylvania. The resort is identified solely as a corporation doing business in Pennsylvania. The record which this Court has before it consists solely of Petitioner's Complaint, the Motion to Dismiss and any judicial admissions contained in the bench opinion delivered by the Court on November 25, 1981. Statements made by counsel for any party to this action concerning factual matters must be disregarded by this Court unless contained in Petitioner's original Complaint.

Summary of Argument

The decision below was in accordance with well-accepted principles of law as set out by this Court and other federal courts. In order to recover on an action against the Borough of Seven Springs, Petitioner must allege a formal or informal policy whereby the Borough authorized or ratified the alleged misconduct of Officer Parfett. This has never been alleged of record although Petitioner has inappropriately set forth these misstatements in his brief.

Petitioner now attempts to add facts to his Complaint in order to establish liability on the part of the Resort which he failed to aver within the time allowed for doing so. Moreover, Petitioner has failed to allege any facts which, if proven, would allow recovery against the resort on the theory that it is a *de facto* municipal corporation. Therefore, there is no question of law at issue which justifies the granting of a Writ of Certiorari.

Argument

The facts upon which Petitioner bases his position are set forth solely in the Complaint filed by the Petitioner to initiate this litigation. A reading of that Complaint clearly demonstrates the liberty taken by the Petitioner in the facts set forth in his brief in support of his petition for certiorari. While Respondents question the accuracy of several holdings as cited by the Petitioner, embellishments with the factual rendition of the Petitioner necessitate even greater scrutiny. A reading of the Complaint and the case law cited in support of Wenturine's petition make it clear that not only has Petitioner failed to overcome the burden placed upon all petitioners for certiorari, he has failed to establish a discrepancy in the decisions of the lower courts.

With respect to the municipality, relevant facts are set forth in Paragraph 14 of Petitioner's Complaint wherein it is stated that:

> "As [a] direct proximate result of the aforesaid acts of Defendant Richard A. Parfett acting on behalf of the other Defendants, Plaintiff John R. Wenturine suffered great bodily pain and injury and mental anguish, from then until now, and he will continue to suffer in the future; he has lost and will continue to lose large sums of money by reason of having been greatly humiliated and held up to the public scorn of derision as a result of the foregoing acts of the Defendants." See Exhibit F, appendix p. 18.

No where is it alleged that Petitioner suffered injuries and damages as a result of the inaction of either employees or high officials of the Borough of Seven Springs. The causation Paragraph, Paragraph 14 of Petitioner's Complaint, is based solely on the doctrine of *respondeat superior* with respect to both the Borough of Seven Springs and Seven Springs Mountain Resort, Inc.

Therefore, contrary to the piecemeal and inaccurate fact situation set forth in Petitioner's brief, the lower court correctly determined that the municipality cannot be vicariously liable for the inactions of an employee. *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L.Ed.2d 492 (1961).

The Petitioner also argues that the officer was advancing a policy of the Resort or the municipality when he allegedly assaulted Wenturine. Not only did Petitioner fail to allege this in his Complaint, counsel for Petitioner stated in response to a question by the Court on this issue, that "... we don't have that type of evidence. That's why it wasn't alleged." See App. p. 43, l. 8. It is Respondent's position that this judicial admission by Petitioner's representative makes it abundantly clear that the record does not support Petitioner's claims.

With respect to the actions of the Resort, a factual review will once again demonstrate that the Petitioner is not claiming a conflict of rulings of Federal Courts or, at the minimum, a misapplication of the settled law. On the contrary, Plaintiff's argument is entirely factual and one not supported by the record.

Petitioner's Complaint merely alleges that Seven Springs Mountain Resort, Inc. is "... a corporation doing business in Pennsylvania." See App. p. 13, Paragraph 5 of Petitioner's Complaint. Factually, at no time did Petitioner allege that the officer was acting under color of law with respect to Seven Springs Mountain Resort, Inc., nor was it alleged that the resort was, in fact, a *de facto* municipality. While certainly Respondents do not question to any great extent the law cited by the Petitioner, the facts do not exist to support

Petitioner's allegations. Consistent with cases such as *Hudgens v. National Labor Relations Board*, 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed.2d 196 (1976), and *Marsh v. Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L.Ed. 265 (1946), the record shows that the resort was never alleged to be anything more than a resort.

Finally, pendant jurisdiction is a discretionary matter for the trial court to consider, *Landrigan v. City of Warwick*, 628 F.2d 736 (1st Cir. 1980), and *Reed v. Philadelphia Housing Authority*, 372 F. Supp. 686 (E.D. Pa. 1974). Appellate Courts have a very limited scope of review over discretionary matters and, Petitioner prays that there is no overriding necessity to granting Certiorari on this issue nor has there been a showing of any clear abuse of discretion.

Conclusion

For reasons set forth above, Respondents, the Borough of Seven Springs and Seven Springs Mountain Resort, Inc., request this Court deny the petition for writ of certiorari.

Respectfully submitted,

GERARD J. CIPRIANI
MAZZOTTA & WINTERS, P.C.
Attorneys for Respondents
Borough of Seven Springs, Inc. and
Seven Springs Mountain Resort

MAZZOTTA & WINTERS, P.C.
2620 One Mellon Bank Center
Pittsburgh, Pennsylvania 15219
(412) 471-0300